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CURRENT TOPICS.

The extent of the right of police officers to arrest without a warrant was considered by the Supreme Court of Michigan, in the recent case of *Quinn v. Heisel.* The court doubted whether a municipal ordinance could justify arrest without process where common law principles do not, but held that arrests may be made without a warrant for breaches of the peace committed in the presence of the officer, but not on information or suspicion for past offenses; and that arrests without process, to prevent threatened breaches of the peace, were only lawful where the threat was accompanied with an overt act. The court said: "There are many loose general statements in the books as to the right of officers to make arrests without warrant. That they have a right to arrest for breaches of the peace committed in their presence is conceded by all. It is equally clear that they can not arrest for a past offense, not a felony, upon information or suspicion thereof, although expressions may be found which would seem to assume such power. How far or when they may interfere by an arrest to prevent a threatened breach of the peace is not equally clear. We are of opinion that a threat or other indication of a breach of the peace will not justify an officer in making an arrest, unless the facts are such as would warrant the officer in believing an arrest necessary to prevent an immediate execution thereof, as where a threat is made coupled with some overt act in attempted execution thereof. In such cases the officer need not wait until the offense is actually committed. To justify such arrest the party must have gone so far in the commission of an offense that proceedings might thereafter be instituted against him therefor, and this without reference to any past similar offense of which the person may have been guilty before the arrival of the officer. The object of permitting an arrest under such circumstances is to prevent a breach of the peace, where the facts show danger of its being immediately committed." See also on this subject, Regina v. Mabel, 9 C. & P. 474; Timothy v. Simpson, 1 C. M. & R. 757; Grant v. Moser, 5 M. & G. 123; Baynes v. Brewster, 2 A. & E. (N. S.) 384; Wheeler v. Whiting, 9 C. & P. 262; Howell v. Jackson, 6 C. & P. 723; Knot v. Gay, 1 Root. 66; State v. Brown, 5 Harr. 597; McCullough v. Com. 67 Pa. St. 32; Russell v. Shuster, 8 W. & S. 307; Com. v. Carey, 12 Cush. 252.

The Supreme Court of the United States in the case of *Cowell v. Colorado Springs Company*, decided at the present term, sustained a condition in a deed of land that intoxicating liquors should never be manufactured, sold or otherwise disposed of as a beverage in any place of public resort on the premises. It was expressly declared in the deed that on breach of this condition by the grantee or his assigns the deed should become null and void, and the title to the premises should revert to the grantor. The defendant having gone into possession of the premises under the deed, opened a billiard saloon in a building therein, which became a place of public resort where he sold intoxicating liquors. It was held by the court that upon such breach the grantor could bring ejectment without a previous entry or demand for possession. Mr. Justice FIELD, said: "The validity of the condition is assailed by the defendant as repugnant to the estate conveyed. His contention is, that as the granting words of the deed purport to transfer the land, and the entire interest of the company therein, he took the property in absolute ownership, with liberty to use it in any lawful manner which he might choose. With such use the condition is inconsistent, and he, therefore, insists that it is repugnant to the estate granted. But the answer is that the owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may affect the value or the nature of the estate. Repugnant conditions are those which tend to the utter subversion of the estate, such as prohibit entirely the alienation or use of the property. Conditions which prohibit its alienation to particular persons, or for a limited period, or its subjection to particular uses, are not subver-

sive of the estate; they do not destroy or limit its alienable or inheritable character. Sheppard's Touchstone, 129, 131. The reports are full of cases where conditions imposing restrictions upon the uses to which property conveyed in fee may be subjected have been upheld. In this way slaughter-houses, soap-factories, distilleries, livery-stables, tanneries, and machine-shops have, in a multitude of instances, been excluded from particular localities, which thus freed from unpleasant sights, noxious vapors or disturbing noises, have become desirable as places for residences of families. To hold that conditions for their exclusion from premises conveyed are inoperative, would defeat numerous arrangements in our large cities for the health and comfort of whole neighborhoods. The condition in the deed of the plaintiff against the manufacture or the sale of intoxicating liquors as a beverage, at any place of public resort on the premises, was not subversive of the estate conveyed. It left the estate alienable and inheritable, and free to be subjected to other uses. It was not unlawful nor against public policy, but on the contrary it was imposed in the interest of public health and morality." For cases in which similar conditions have been sustained, see Plumb v. Tubbs, 41 N. Y. 442; Doe v. Keeling, 1 M. & S. 95; Gray v. Blanchard, 8 Pick. 282; 14 Kas. 61.

In *ex parte Langley*, decided by the English Court of Appeal on the 12th ult., the question was raised whether notice by telegram of an injunction, granted by the Court of Bankruptcy to restrain a sale, was sufficient to render persons who after receiving the notice committed a breach of the injunction, liable to be committed for a contempt of court. The chief judge had made an order for the committal of a sheriff's officer and an auctioneer, the latter having sold the goods of an execution debtor, who had filed a liquidation petition, after a telegram had been shown to him, purporting to be sent by some London solicitors, and addressed to the sheriff's officer in possession, which stated that an injunction restraining the sale (which was taking place in the country) had been granted by the London Court of Bankruptcy. The sheriff's officer was not present when the telegram was received, he having gone away on other business, but he had left a deputy in possession. Upon receipt of the telegram the deputy telegraphed to the officer for instructions, telling him that a telegram had been received to stop the sale, but saying nothing about an order of the Court of Bankruptcy. The officer replied by telegram, that if the debtor had filed a petition or the debt was paid, the sale was to be stopped, otherwise it was to proceed. The sale was then continued. It appeared from the evidence that there had been some previous attempts by the debtor to stop the sale, and that he had promised to come and pay the execution debt, and the auctioneer swore positively that he believed the telegram to the sheriff's officer was a mere *ruse* of the debtor, and had no suspicion that any proceeding had been taken in the Court of Bankruptcy, or that any order had been made by it. The Court of Appeal held that there was no ground for the application as against the sheriff's officer, he having had no actual notice of the injunction. He could not be held in such a way responsible for the act of his subordinate. And as to the auctioneer, the court said that though no doubt there were circumstances of suspicion against him, they could not, after his positive affidavit, order him to be committed, the evidence showing that that which had taken place might not unreasonably have led him to form the conclusion which he swore that he did form. The court ordered that the sheriff's officer should have his costs in both courts, but that the auctioneer should bear his own costs. JAMES, L. J., was very far from saying that sufficient notice of an injunction could not in any circumstance be given by telegram, and THESIGER, L. J., said that he did not dissent from the proposition laid down by the chief judge in *in re* Bryant 25 W. R. 230, L. R. 4 Ch. D. 98, that under certain circumstances a notice of an injunction given by telegram might be sufficient to render a person who disregarded it liable to be committed for contempt. But, in each case, the question would be whether the notice given was such that it could be reasonably inferred that the person who received it had had actual notice of the injunction. And the *onus* of proof must be on those who asserted

that there had been such a notice. If the sheriff's officer had received the notice of the restraining order which purported to come from some solicitors in London, he ought to have telegraphed either to the sheriff's London agents, or to the Court of Bankruptcy, to inquire whether the order had really been made, but it would be the height of injustice to hold him criminally responsible for the omission of his subordinate to do this. JAMES, L. J., added that he thought the proper course for a solicitor who had obtained such an injunction would be to telegraph the order to some solicitor as his agent at the place in the country, asking him to give notice of it to the persons affected. There would then be the responsibility of an officer of the court.

A NEW PHASE OF THE DOCTRINE OF ULTRA VIRES.

It is not intended in this place to enter into an elaborate discussion of the peculiarities of this peculiar doctrine, by which it is conclusively presumed that what *has been* done, was *not* done, because the doer had not the power to do it. This proposition has been worked out by a resort to the admirable subtleties of legal logic, the fine-spun intricacies of which have served to elevate law to a proud place among the abstruse sciences. In elaborating this doctrine the words *ultra vires* have become one of those secret pass words which serve to unlock to the initiated much of the mystery that surrounds like a halo, the administration of justice between man and man. Before the awful sound of this portentious exclamation the unlearned halt with open-eyed wonder, oppressed by the feeling that there must be something of fearful import lying beyond.

No two words (we were about to say in the English language), have tied up in them such a stunning array of abstrusities. They mean so much that is difficult for the unlearned to understand, even when explained, that there seems to be a kind of luxury in rolling them about in the mouth, knowing that their utterance may prove so fateful to the innocent victims of our scientific system of jurisprudence. The very fact that to those not thoroughly imbued with the idea of "Law as a Science," it may seem absurd and unjust to say that a private corporation may be organized with officers and agents apparently capable of doing everything which individuals may do when engaged in the same business, yet that the corporation is only liable for the things done by the officers and agents, which they had a right to do, only adds to the delight with which the lawyer revels in the consciousness of his exclusive knowledge.

This doctrine is one which has generally been invoked by corporations as a defence to actions on its contracts. The feature which exasperates the plaintiff in such an action is that the contracting corporation has already enjoyed the benefit to be derived from the transaction, and only pleads its impotency when called upon to discharge the obligation originally assumed. This is, however, a very narrow, stolid and interested light in which to look at the beautiful system of which *ultra vires* forms a part. It ignores the scientific features of the law altogether. The uninformed plaintiff, in pursuing his remedy against a corporation, meeting with unexpected obstruction, is apt to view this as an invention for the special benefit of the defendant.

The cold law of corporate liability briefly explained is that unlike private individuals these bodies politic have no powers not expressly granted by their charters. When called into being by statute, their capacity to contract is only such as the creative act gives them in express terms.[1] And when the enactment by which they are created expressly prohibits them from entering into certain contracts, of course they will be disabled from binding themselves in that manner. These features of the doctrine might be supported by pages of cases cited from English and American reports, but they are so familiar to the profession as to render the labor of citation one of supererogation. It is only the new feature of the doctrine, and the new cases illustrating its interior beauties, to which it is desired to call special attention.

Ultra vires, pure and simple, has long since been the settled doctrine by which the liability of private corporations is to be measured.

1 Bank of United States v. Danbridge, 12 Wheat. 64; Ruggles v. Collins, 43 Mo. 353; Bank of Louisville v. Young, 37 Mo. 398; Great Eastern Railway v. Turner, L. R. 8 Ch. App. 152; Head v. Providence Insurance Co., 2 Cranch, 127.

So long as it was only employed for the legitimate purposes for which it was originally invented—that is to protect private corporations from the consequences of the rash acts of their officers and agents—all went well enough. This purpose is not expressed in terms by any of the judges, but is neatly and scientifically disclosed to the learned understanding in the formula, "public policy." It is solely through considerations of public policy that the courts have undertaken to extend this sort of protection to private corporations for banking purposes. Juries have also got hold of the idea that there is a certain policy which may be called into play on behalf of the public, in corporation cases, which is sufficiently masterful in its demands to override such considerations as control strictly private transactions. So far the juries are right; but, being incapable of taking a scientific view of the matter, they naturally fall into error as to which side of the counter the public stands on. They, the juries, suppose the public to be made up of those who deal with the corporations, whereas the courts have settled the doctrine that the policy is public which best serves to protect the rights and interests of private corporations—especially banks—from the adverse claims of individuals, who, how numerous soever they may be, having no stock in a corporation, are, as individuals, too private and insignificant to cut any figure whatever as public characters. They can have no interest in public policy.

This revolutionary tendency on the part of juries is not the only peril to which the corporations have been exposed. Certain hard-headed judges, of undoubted ability, but who seem to still retain enough of that coarse mental quality denominated "common sense," to disable them from seeing clearly the nicer points of distinction in which scientific law abounds, have undertaken to follow the vulgar maxim that, "it's a poor rule that won't work both ways." That is, work both ways alike. This homely proverb has been found utterly inapplicable to the science of law, and to none of the rules of law more notably than to the doctrine of *ultra vires*. The case of Weckler v. First National Bank,[2] is an example of the working of this rule favorably to a banking corporation. In that case the bank undertook to render itself liable on a sale of railroad stocks; but, when the action was brought to fix this liability, the plea of *ultra vires* was sustained for the reason that such transactions were beyond the powers conferred by charter upon the corporation. Again, when it was sought to hold the bank liable for special deposits, the same doctrine was held to release it from liability, for the reason as expressed by the judge delivering the opinion that, "it was never designed that the bank should be converted into a kind of pawn-broker's shop."[3]

National banks are authorized, among other things, to do business "by loaning money on personal security." In a case where the bank had undertaken to hold certain real estate as security for a loan made contemporaneously with the taking of the security, it was decided that the transaction was unauthorized by the act of Congress creating the bank, and the rule was worked the other way. Says the learned judge who rendered the opinion: "In view of the rule of interpretation of such charters, given to us by the Federal courts, and of the maxim *expressio unius est exclusio alterius*, the argument might close with the power to loan money on personal security: for, agreeably to this rule and maxim, no other security than personal can be taken for money lent. This is the law of the bank's capacity, and of its contract." This view is further supported by the assignment of what seems to be good and sufficient reasons for this restriction: "The business of a bank is commercial— not that of dealing in real estate, brokerage, &c. It therefore does not buy and sell real estate, ground rents, &c. * * * It deals in commercial paper on the security afforded by the personal responsibility of drawers, indorsers, payer, &c." The conclusion reached is that "it is a clear and incontrovertible position, therefore, that a national bank can not lend money on the security of a mortgage, and that the power to take and hold a mortgage is confined to the second case in the 20th section [of the banking act], for debts previously contracted." Now if this argument had been applied for the purpose of showing that the bank could not be held to respond on account of any liability assumed by such unauthorized

(2) 42 Md. 581.

(3) Lloyd v. West Branch Bank, 15 Pa. St. 172. See also Wiley v. First National Bank, 47 Vt. 546.

(4) Fowler v. Scully, 72 Pa. St. 456.

transaction, there is no question but that it would have been regarded as perfectly valid. It would have been pat with previous decisions, and would have preserved the beauty and symmetry of the doctrine of *ultra vires*, which, resting upon the disabling effects of statutory restraints upon the corporation, operates to release that artificial person from liability which it tries, for its own advantage, to assume. In a later case in the Supreme Court of this State,[5] this doctrine was resorted to for the purpose of restraining by injunction the sale of real estate by the trustee of a national bank. It was claimed that the deed of trust in the hands of the bank, having been taken contrary to the provisions of the act of Congress,[6] was not a valid security, and could not be enforced. Judge Wagner in pronouncing the opinion of the court, follows a line of argument substantially similar to that in Fowler v. Scully; he takes the doctrine of *ultra vires* just as he finds it, and although he does not mar his elegant diction with any such vulgar maxim as: "What is sauce for the goose is sauce for the gander," such is the effect of the conclusion arrived at. In following the rule to its consequences he seems to think that a doctrine intended as a restraint upon corporations was not contrived solely for their benefit. In other words that the corporations exceeding their powers were not the only ones who were at liberty to avail themselves of the consequent exemption from liability. The reasoning in this case is very good, so far as it goes, but it does not go far enough to reach the new phase of this important doctrine. So far as the holding is that such a transaction was *ultra vires* it was all right, and fully sustained by the Supreme Court of the United States, where the case went on error.[8] Says Mr. Justice Swayne:[9] "Section 5136 does not in terms prohibit a loan on real estate, but the implication to that effect is clear. What is so implied is as effectual as if it were expressed." But in this particular case the note and deed of trust were made to a third party, and by him at once transferred to the bank. Mr. Justice Swayne was able to discern the difference between taking a deed of trust by means of a conduit, and taking it directly to the bank, which was not so clear to the less piercing legal vision of the Missouri judge. It is a fine point and hard to see, but the Federal Court cited an authority in support of their view.[10] A number of authorities were also cited to show that the obligation to pay the note was not affected by the invalidity of the security, but this was hardly necessary, as that was not the point in ssue. It is said in the opinion: "A court of equity is always reluctant in the last degree to make a decree which will effect a forfeiture. The bank parted with its money in good faith. Its garments are unspotted. Under these circumstances the defense of *ultra vires*, if it can be made, does not address itself favorably to the mind of the chancellor." Further on he says: "We can not believe that it was meant that stockholders, and perhaps depositors and other creditors, should be punished, and the borrower rewarded, by giving success to this defense whenever the offensive fact shall occur." Had the bank been the borrower and mortgagor, contrary to the terms of the charter, there would have been no room for such considerations as "good faith" on the part of the lenders. It would not have mattered how much he and his creditors were "punished" and the bank "rewarded." *Ultra vires* could then have been interposed in behalf of the corporation, and the innocent but stupid outsiders left to take care of themselves and their creditors as best they might. According to the majority opinion in this case, the only manner in which the bank could be punished for such offenses as these is by a proceeding in the nature of a *quo warranto*, to forfeit its charter. This would seem rather harsh to an institution whose "garments were unspotted." However, Mr. Justice Miller does not agree with the majority. He says; "I am of opinion that the national banking act makes void every mortgage or other conveyance of land as a security for money loaned by the bank at the time of the transaction to whomsoever the conveyance may be made; that the bank is forbidden to accept such security, and it is void in its hands." Mr. Justice Miller is an able lawyer, and has an old-fashioned way of

(5.) Matthews v. Skinker, 62 Mo. 329, 3 Cent. L. J. 6.
(6.) Rev. Stat. U. S. 998, §§ 5136, 5137, 8 Cent. L. 131.
(8.) National Bank v. Matthews, 98 U. S. 621.
(9.) Ibid, 625.
(10.) First National Bank, etc., v. Haine, 36 Iowa, 443.

understanding others to mean, as he does, what they say. When he finds the law definitely settled that the acts of corporations done in excess of the authority granted by their charters are void, he understands it to mean that they are not merely voidable at the instance of the offending corporations. But this one-sided interpretation of the rule of corporate incapacity is the latest expression of the tribunal of highest authority in this country, and it must be accepted as final.

W.

CONVERSION OF TIMBER SEVERED BY MORTGAGOR FROM MORTGAGED PREMISES.

SEARLE v. SAWYER.

Supreme Judicial Court of Massachusetts, September Term, 1878.

1. A MORTGAGEE IS SO FAR the owner in fee of the mortgaged estate that if any part of it is wrongfully severed and converted into personalty by the mortgagor his interest is not divested, but he remains the owner of the personalty and may follow it and recover it or its value of any one who has converted it to his own use. But the severance must be wrongful, and where it is made by the mortgagor or one acting under his authority, whether it is wrongful will depend upon the question whether a license to do the act has been expressly given or is fairly to be implied from the relations of the parties.

2. WHERE THE MORTGAGED ESTATE is a farm, a license to cut and carry to market wood and timber to a limited extent might be implied from the relation of the parties, if in carrying on similar farms it is usual and good husbandry so to do.

David Hill, for plaintiff; *Bond Bros. & Bottum*, for defendant.

MORTON, J., delivered the opinion of the court:

This is an action of tort for the conversion of a quantity of wood and timber. It appeared at the trial that one Warren, being the owner of a lot of wood land, mortgaged it to the plaintiff's testator, and that after the condition of the mortgage was broken but before the mortgagee had taken possession, Warren cut the wood and timber in question and sold it to the defendant.

The presiding justice of the superior court ruled that, "if the defendant bought of the mortgagor wood and timber cut from the mortgaged premises, and exercised such acts of ownership over the same as would amount to a conversion, then he would be liable to the mortgagee for the value of the same, without any previous demand, and although he bought the same in good faith and without any notice or knowledge of any claim upon the same." To this ruling the defendant excepted.

Upon the question whether, if a mortgagor commits waste by removing buildings, wood, timber, fixtures or other parts of the realty, the mortgagee out of possession can follow the property after it has been severed and recover it or its value, there have been conflicting decisions in different jurisdictions. In New York and Connecticut it has been held that a mortgagee out of possession can not maintain an action at law for waste committed by the mortgagor, and that he has no property in wood or timber cut and removed so as to enable him to maintain trover for its conversion. Peterson v. Clark, 15 Johns. 205; Cooper v. Davis, 15 Conn. 556. On the other hand, it has been held in Maine, New Hampshire, Vermont and Rhode Island, that timber, if wrongfully cut and removed by the mortgagor, remains the property of the mortgagee out of possession, and he may recover its value of the mortgagor or a purchaser from him. Gore v. Jenness, 19 Me. 53; Frothingham v. McKusick, 24 Me. 403; Smith v. Moore, 11 N. H. 55; Langdon v. Paul, 22 Vt. 205; Waterman v. Matteson, 4 R. I. 539.

We are not aware that this precise question has been adjudicated in this State, but the previous decisions of this court in regard to the rights of mortgagees and the nature of their interest in the mortgaged estate, are such as to lead to the conclusion that a mortgagee out of possession is entitled to timber, fixtures, and other parts of the realty wrongfully severed, and may recover them or their value if a conversion is proved.

In Fay v. Brewer, 3 Pick. 203, it was held that a mortgagee in possession, but before foreclosure, could maintain an action on the case in the nature of waste against a tenant for life, for cutting down trees on the mortgaged land before he took possession, and the court, in the opinion, comment on the case of Peterson v. Clark, 15 Johns. 205, as not being of authority here, "since the law of mortgage in New York is so different from our own." In Page v. Robinson, 10 Cush. 99, it was held that a mortgagee, after condition broken, though not in actual possession, could maintain trespass against the mortgagor, or one acting under his authority, for cutting and carrying away timber trees from the mortgaged premises, without license express or implied from the mortgagee. In Cole v. Stewart, 11 Cush. 181, it was held that an action at law would lie by a mortgagee not in possession against one who, under authority from the mortgagor, removed a building from the mortgaged land. In Butler v. Page, 7 Met. 40, a second mortgagee sold to the defendant a building standing on the mortgaged land, who took it down and removed the materials. It was held that the administrator of the mortgagor could not maintain trover for the materials, as the fee of the mortgaged premises was in the mortgagees, and the removal of the building vested no property in the materials in the mortgagor's representatives. In Wilmarth v. Bancroft, 10 Allen, 348, a house standing on mortgaged land was partially destroyed by fire. The mortgagor sold to the defendant such materials as were saved and brought this action to recover the price agreed to be paid. It was held that the fact that the mort-

gagee had claimed the agreed price and had forbidden the defendant to pay it to the mortgagor, was a good defense. The opinion is put upon the ground that the partial burning of the house and the consequent severance of the unburnt materials "did not terminate or affect the mortgagee's interest in the fixtures." So it has been held in several cases that a mortgagee out of possession may maintain an action at law against the mortgagor or a stranger for removing fixtures and thus impairing the security. Gooding v. Shea, 103 Mass. 360; Byrom v. Chapin, 113 Mass. 308; King v. Bangs, 120 Mass. 514.

The fair result of these authorities is that under our law a mortgagee is so far the owner in fee of the mortgaged estate that if any part of it is wrongfully severed and converted into personalty by the mortgagor, his interest is not divested, but he remains the owner of the personalty, and may follow it and recover it or its value of any one who has converted it to his own use. Stanley v. Gaylord, 1 Cush. 536; Riley v. Boston Water Power Co., 11 Cush. 11.

But the severance must be wrongful, and where it is made by the mortgagor or one acting under his authority, whether it is was wrongful or not will depend upon the question whether a license to do the act has been expressly given or is fairly to be applied from the relations of the parties. The true rule is as stated in Smith v. Moore, 15 N. H. 55, and approved in Page v. Robinson, 10 Cush. 99, that acts of the mortgagor in cutting wood and timber or otherwise severing parts of the realty are not wrongful, when from the circumstances of the case the assent of the mortgagor may be reasonably presumed. The relation between mortgagor and mortgagee is a very peculiar one. The mortgagee takes an estate in fee, but the sole purpose of the mortgage is to secure his debt. Usually in this State the mortgage contains a provision that the mortgagor may retain possession until condition broken. The object object of this is that the mortgagor may have the use and enjoyment of his property, and it implies a license to use it in the same manner as such property is ordinarily used, and as will not unnecessarily impair the adequacy of the security. If a mortgage be of a dwelling-house the mortgagor may do many acts, such as acts of repair or alteration, which may involve the removal of parts of the realty, which would not be wrongful because within the license implied from the relations of the parties. If a farmer mortgages the whole or a part of his farm, with a clause permitting him to retain possession, as was probably the case at bar, it is within the contemplation of the parties that he is to carry on his farm in the usual manner, and a license to do so is implied. In such case it is clear that he is entitled to take the annual crops, and wood for fuel. Woodward v. Pickett, 8 Gray, 617. And we do not think that the implied license is necessarily limited to the annual crops, but that it extends to any acts of carrying on the farm which are usual and proper in the course of good husbandry. If in carrying on similar farms it is usual and is good husbandary to cut and carry to market wood and timber to a limited extent, a license to do this might be implied from the relation of the parties.

The bill of exceptions furnishes us with so meagre and imperfect a history of the case that we are unable to say how far these considerations are applicable to the case at bar. But the ruling of the presiding justice seems to have been general that the defendant would be liable if the wood and timber were cut from the mortgaged premises, and to have excluded the question whether, under the circumstances of the case, the assent of the mortgagee thereto could fairly be presumed by the jury.

We are of opinion that this question should be submitted to the jury, and therefore that a new trial must be ordered.

Exceptions sustained.

NOTE.—See 7 Cent. L. J. 299.

CONSTRUCTION OF STATE CONSTITUTIONS AND STATUTES BY FEDERAL COURTS.

FAIRFIELD v. COUNTY OF GALLATIN.

Supreme Court of the United States, October Term, 1879.

1. CONSTRUCTION OF CONSTITUTIONS AND STATUTES—WHEN INTERPRETATION OF STATE COURTS FOLLOWED BY FEDERAL COURTS. — In cases depending upon the Constitution or statutes of a State, the Supreme Court of the United States adopts the construction of the Constitution or statutes given by the courts of the State, when that construction can be ascertained, and when different and conflicting interpretations have not been made by the State courts.

2. MUNICIPAL BONDS—CASE IN JUDGMENT.—In a suit upon coupons of a series of bonds issued by the defendant, a county in the State of Illinois, in October, 1870, as a donation to assist in the construction of a railroad, the question presented was whether a donation to a railroad company legally authorized and approved by a majority of the legal voters of a county prior to the adoption of the new State Constitution is rendered invalid by a prohibition of such donations contained in that Constitution. In Town of Concord v. Portsmouth Savings Bank, 92 U. S. 625, 3 Cent. L. J. 349, this court held that donations by counties to railroads were prohibited by the Constitution; that they could not lawfully be made after July 2, 1870, even although they had been authorized by a prior statute and by a vote of the people of the county. It now appearing, however, that prior to the above decision by this court, the Supreme Court of Illinois in construing this same section had, unknown to this court at that time, decided that donations, if sanctioned by popular vote before the adoption of the Constitution, are not prohibited by it, this court changes its decision as made in Town of Concord v. Portsmouth Savings Bank, *supra*, and adopts the interpretation of the State Supreme Court.

In error to the Circuit Court of the United States for the Southern District of Illinois.

Mr. Justice STRONG delivered the opinion of the court:

The facts of this case, so far as they are needed to exhibit the question presented by the writ of error, are very few. The defendant, on and prior to Feb. 28, 1868, was a lawfully organized and existing county of the State of Illinois, through which was located the railroad of the Illinois Southeastern Railway Company, a company incorporated on the 25th of February, 1867. The county was authorized by the legislature of the State to donate to the railroad company, as a *bonus* or inducement towards the building of the railroad, any sum not exceeding one hundred thousand dollars, and was authorized to order the clerk of the county court, or board of supervisors of the county, to issue county bonds to the amount donated, and deliver them to the company, provided that no donation exceeding fifty thousand dollars should be made until after the question of such larger donation should have been submitted to the legal voters of the county at an election called and conducted in the usual manner. The statute further enacted, that if a majority of the ballots cast at such an election should be in favor of a donation, it should be the duty of the county court or board of supervisors to donate some amount, not less than fifty thousand dollars nor more than one hundred thousand dollars, to the company, and to order the issue of county bonds for the amount so donated.

On the 28th of February, 1868, in pursuance of these statutory enactments, an election of the legal voters of the county was held to determine whether the county would donate one hundred thousand dollars of its bonds in aid of the said road, and the election resulted in authorizing their issue. The bonds were accordingly issued by the county judge and county clerk, under the direction of the county court, and they were delivered to the railroad company on the 6th or 8th of October, 1870, after the conditions precedent to their delivery had been fulfilled. The plaintiff is the holder of coupons belonging to said issue, having purchased them before due, in the usual course of his business.

The defense set up is, in substance, that in consequence of a provision in the new Constitution of the State, which came into force July 2, 1870, the authority to issue and deliver the bonds had ceased to exist before the issue was made. The section of the Constitution relied upon is in the following words: "No county, city, town, township, or other municipality, shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation, or loan its credit in aid of such corporation; provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions, where the same have been authorized under existing laws, by a vote of the people of such municipalities, prior to such adoption."

The question presented, then, is whether a donation to a railroad company, by a county empowered by the legislature to make such a donation, when approved by a majority of the legal voters of the county at an election held for that purpose, is forbidden by this clause of the Constitution, if it was authorized under laws then existing by a vote of the people of the county prior to the adoption of the Constitution? What should be the answer to the question depends upon the construction that must be given to the section thus quoted. Are donations, thus authorized by a popular vote, within the prohibition, or are they excepted out of it by the proviso?

In Town of Concord v. Portsmouth Savings Bank, 92 U. S. 525, 3 Cent. L. J. 349, we had occasion to construe this section of the State Constitution. We then held that donations by counties or other municipalities to railroad companies were prohibited by it, and that they could not lawfully be made after July 2, 1870, though they had been authorized by a prior statute and by a vote of the people of the county or municipality before the adoption of the Constitution. We were fully aware that it is the peculiar province of the Supreme Court of a State to interpret its organic law as well as its statutes, and that it is the duty as well as the pleasure of this court to follow and adopt that court's interpretation. But we were not informed when the case was decided, that the Supreme Court of the State had given any construction to the constitutional provision. It now appears that before that time that court had the provision under consideration, and had decided that donations, equally with subscriptions, if sanctioned by a popular vote before the adoption of the Constitution, are not prohibited by it, and that they are excepted from the prohibition by the proviso. This was decided by the State court in 1874, more than a year before Town of Concord v. Savings Bank came before us, but the decision was not called to our notice, and it was not reported until 1877. It may now be found in 74 Ill. 277. The language of the court is very positive. We quote it at some length, as follows: "At the time the section of the Constitution referred to was framed, large sums of money in different parts of the State had been voted by municipalities to be subscribed and donated to railroad companies, on condition that railroads then being constructed should be completed within a given time, and the country, whether wisely and judiciously or not, seemed to demand that in cases where the people in these municipalities had, under then existing legislation, voted to aid railroads by subscription or donation prior to the adoption of the Constitution, such subscription or donation should not be affected by the formation of the Constitution. And we have no doubt it was in view of this demand of a large portion of the State that the proviso was engrafted in the foregoing section. * * * * A reasonable construction of the whole section will embrace donations as well as subscriptions. In one sense of the term a donation is a subscription to the capital stock of a company. We have no doubt, at the time this section was framed, there were then in the State quite as many donations voted as there were subscriptions

to stock in any other manner, and if a necessity or reason existed to protect a subscription there was also the same reason and demand to protect a donation, and we entertain no doubt it was the intention of the framers of the Constitution, by adding the proviso to the section, to place subscriptions and donations on the same footing." This authoritative exposition of the meaning of the Constitution of the State by its highest court has repeatedly been recognized by that tribunal. Town of Middleport v. Ætna Life Ins. Co., 82 Ill. 562; Lippincott v. Town of Pana, 9 Cent. L. J. 428. It has also been the understanding of the legislature of the State that donations as well as subscriptions, if authorized by a vote of the people before the adoption of the Constitution, are saved by the proviso. In 1874, an act of the general assembly was passed which declared that the liability of all counties, cities, townships, towns, or precincts that had voted aid, donations or subscriptions to the capital stock of any railroad company, in conformity with the laws of the State, should cease and determine at the expiration of three years after July 1st of that year, and that after that time no bonds should be issued on account of or upon authority of such vote. This implied that up to July, 1877, donations voted before July 2, 1870, were lawful, and might be completed by the issue of bonds. It was an expression of the legislative understanding that such donations were not forbidden by the Constitution. Act of March 17, 1874. A similar act was passed on the 29th of May, 1877, extending the time for issuing bonds for donations upon the authority of a vote of the people, until July 1, 1880. It thus appears to have become a rule of property in the State that municipal bonds, issued to railroad companies on account of donations voted by the people before the adoption of the Constitution, are valid, though not issued until after the adoption. Such was the earliest exposition of the Constitution made by the court of last resort in the State, twice since recognized by it, and recognized also by repeated legislative action. There is every reason to believe that the rule has been relied upon, and that on the faith of it many municipal bonds have been issued, bought and sold in the markets of the country.

In view of all this, ought this court to adhere to the construction we gave to the State Constitution in ignorance of the fact that the Supreme Court of the State had previously construed it in a different manner? At a very early day it was announced that in cases depending upon the Constituton or statutes of a State this court would adopt the construction of the statutes or Constitution given by the courts of the State, when that construction could be ascertained. Polk's Lessee v. Wendell, 9 Cranch, 98; Nesmith v. Sheldon. 7 How. 818, where it is declared to be the "established doctrine that this court will adopt and follow the decisions of the State courts in the construction of their own Constitution and statutes, when that construction has been settled by the decisions of its highest tribunal." In Walker v. State Harbor Commissioners, 17 Wall. 651, we said "this court follows the adjudications of the highest court of the State" in the construction of its statutes. Its interpretation is accepted as the true interpretation, whatever may be our opinion of its original soundness. See also, Elmendorff v. Taylor, 10 Wheat. 159; Green v. Neal, 6 Pet. 295; Leffingwell v. Warren, 2 Black, 603; Sumner v. Hicks, 2 Black, 532; Olcott v. Supervisors, 16 Wall. 689; and State Railroad Tax Cases, 2 Otto, 618, 3 Cent. L. J. 340.

Such has been our general rule of decision. Undoubtedly some exceptions to it have been recognized. One of them is that when the highest court of a State has given different constructions to its Constitution and laws, at different times, and rights have been acquired under the former construction, we have followed that and disregarded the latter. The present case is not within that exception, for there have been no conflicting interpretations by the State court of the section of the Constitution we are now called upon to construe. And we are not constrained to refuse following the decision of the State court in order to save rights acquired on the faith of our ruling in Concord v. Savings Bank. Groves v. Slaughter, 15 Pet. 449, may seem to be an exception to the rule, but if carefully examined it will be found to be no exception. In that case this court held that the Constitution of Mississippi did not, *ex proprio vigore*, prohibit the introduction of slaves into that State as merchandise or for sale, after the first day of May, 1833, and, therefore, that a promissory note given for the price of slaves thus introduced was not void. This was held, though it appeared that prior to the decision the chancellor of the State had refused to enjoin a judgment at law recovered upon a bond for the purchase of slaves brought into the State for sale after May 1, 1833, and the Court of Errors, two judges against one, had affirmed the refusal of the chancellor. But the decision of the chancellor was rested entirely upon the ground that the matter relied upon to obtain the injunction should have been set up as a defense in the suit at law. This was all that was really decided. The opinions expressed in the Court of Errors by the judges upon the question whether the introduction of slaves after May 1, 1833, was prohibited by the Constitution, were extra-judicial, and were so regarded by this court. It was said they were not sufficient to justify this court in considering that the construction of the Constitution of Mississippi had become so fixed and settled as to preclude the Federal Supreme Court from regarding it as an open question. Groves v. Slaughter, therefore, is not an exception to the rule that this court will follow the construction given by the highest court of a State to its Constitution. On the contrary, the court assented to the rule.

Subsequently, the provision of the Constitution of Mississippi was brought before the courts of the State, and it was settled by the highest tribunals that it did of itself, and without any legislative enactment, prohibit the introduction of slaves as merchandise and for sale, and render all contracts for the sale of slaves, made after May 1, 1833, illegal and void. The case of Rowan v. Runnels, 5 How. 134, then came up to this court,

where the same question was presented, and the construction given by this court to the State Constitution was adhered to, in order to support a contract for slaves purchased, and apparently only for that reason. Chief Justice Taney, in delivering the opinion of the court, said that in Groves v. Slaughter the court was satisfied that the validity of these sales had not been brought into question in any of the tribunals of the State until long after the contract was made, and that as late as the beginning of 1841, when Groves v. Slaughter was decided, it did not appear from anything before the court that the construction of the clause in question had been settled either way, by judicial decision, in the courts of the State. He added: "Undoubtedly this court will always feel itself bound to respect the decisions of the State courts, and, from the time they are made, will regard them as conclusive in all cases upon the construction of their own Constitution and laws. But we ought not to give to them a retroactive effect and allow them to render invalid contracts entered into with citizens of other States, which, in the judgment of this court, were lawfully made."

That case is totally unlike the present. Th bonds in question now were issued in October, 1870. In 1874 the highest court of the State decided that such bonds could be lawfully issued and that they were not forbidden by the Constitution. It was, therefore, conclusively settled more than a year before Concord v. Savings Bank was decided by us, what the meaning of the Constitution was. We are now asked to decline following the construction given and since recognized by the State court and to adhere to that adopted by us in ignorance of the prior judgment of the State court, and that, not as in Rowan v. Runnels, to uphold contracts, but to strike them down, though they were made in accordance with the settled law of the State. We recognize the importance of the rule *stare decisis*. We recognize also the other rule that this court will follow the decisions of the State courts, giving a construction to their Constitutions and laws, and more especially when those decisions have become rules of property in the States, and when contracts must have been made or purchases in reliance upon them. And it has been held that this court will abandon its former decisions construing a State statute if the State courts have subsequently given to it a different construction. In Green v. Neal's Lessee, 6 Pet. 291, the question raised was whether the court would adhere to its own decision in such a case, or would recede from it and follow the decisions of the State court. In two previous cases a certain construction had been given to a statute of Tennessee in supposed harmony with the decisions of the State court. But subsequently it was decided otherwise by the State Supreme Court, and it appeared that the decisions upon which this court had relied were made under peculiar circumstances, and were never in the State considered as fully settling the construction of the act. This court, therefore, overruled its former two decisions and followed the later construction adopted by the State court. See also, Suydam v. Williamson, 24 How. 427. With much more reason may we change our decision construing a State Constitution when no rights have been acquired under it and when it is made to appear that before the decision was made the highest tribunal of the State had interpreted the Constitution differently, when that interpretation within the State fixed a rule of property and has never been abandoned. In such a case we think it our duty to follow the State courts and adopt as the true construction that which those courts have declared.

The judgment of the circuit court is reversed, and the record is remitted with instructions to give judgment for the plaintiff below on the findings made.

NOTE.—See in addition to the cases cited in this opinion, Town of Concord v. Portsmouth Savings Bank, 3 Cent. L. J. 318.

SURVIVAL OF ACTIONS.

TICHENOR v. HAYES.

Supreme Court of New Jersey, June Term, 1879.

1. AN ACTION IN TORT for negligence or deceit will lie against the personal representative of a deceased wrongdoer.

2. CASE IN JUDGMENT.—An action *ex delicto* was brought against the administratrix of a deceased attorney at law for negligence in the discharge of his duty, and in some of the counts deceit was charged: *Held*, that the action was sustainable.

Demurrer to narr.

The declaration contained six counts that related to two classes of transactions. The first class of counts was founded on a breach of duty in the defendant's intestate, arising out of an alleged retainer of such intestate as an attorney at law by the plaintiff, in regard to certain mortgages about to be purchased by the plaintiff, by means of which his money was lost. The second class alleged that the plaintiff was induced, by the deceitful and fraudulent misrepresentations of such intestate, to invest his money in the purchase of certain mortgages; that the representations were false, and known to be so; and that the plaintiff, relying on them made the investments, which proved worthless.

Alward & Parrot, for plaintiff; *T. N. McCarter*, for demurrant.

BEASLEY, C. J., delivered the opinion of the court:

This is a suit against an administratrix. Some of the counts in the declaration, which is demurred to, are founded on a breach of duty in the defendant's intestate, as an attorney at law, in investigating the title and condition, with respect to incumbrances, of a certain property upon which the plaintiff was about to take a mortgage, and whereby the plaintiff lost the money invested by

him. The other counts allege, as the gravamen of the action, certain false and fraudulent representations made by such intestate with respect to certain mortgages, in consequence of which the plaintiff put his money in them, and that such securities proved worthless.

The demurrer that has been put in to this declaration is intended to raise but a single question, which is, whether the causes of action thus stated will survive against the personal representative of the deceased wrongdoer.

The action as to form is in tort. I do not understand from the brief of the counsel of the defendant, that it is contended that if the suit had been in the mode of an action *ex contractu* for the non-performance of the implied contract that the attorney would exercise due care and skill touching the business of his client, such action would not have survived. Upon this point the law is settled by numerous decisions. In some of these the distinction, with respect to the capacity to survive, that exists between the forms of *assumpsit* and tort, is sharply drawn. Such, in this particular, is the aspect of Knight v. Quarles, 2 Brod. & Bing. 102, which was a suit in *assumpsit* by an administrator, growing out of an undertaking by the defendant, who was an attorney, to investigate and see that a title about to be conveyed to the intestate was a good one, the breach being that the defendant failed to do so, and that the intestate in consequence took an insufficient title, to the injury of his personal estate. On these facts, the judicial opinion was that such cause of action survived to the personal representative, such result being reached by the rules of the common law, irrespectively of any statutory modification. It was considered that the whole transaction rested on a contract, and that a right to sue, arising from a breach, passed to the administrator, and in the course of the opinion read on that occasion it was observed by way of illustration, "that if a man contracted for a safe conveyance by a coach, and sustained an injury by a fall, by which his means of improving his personal property were destroyed, and that property in consequence injured, though it was clear he in his lifetime might at his election sue the coach proprietor in contract or in tort, it could not be doubted that his executor might sue in *assumpsit* for the coach proprietor's breach of contract."

This same distinction, in this respect, between these two forms of action, is emphasized in several of the more recent decisions of the English courts. One of these is the case of Bradshaw v. Lancashire &c. R. Co., L. R., 10 C. P. 189, which was a suit *ex contractu* by an executrix for injuries inflicted on the testator, in consequence of which, after an interval, he had died, the purpose of the suit being to recover for medical expenses, and the loss that had been occasioned by the inability of the testator to attend to his business. The ground that was expressed for sustaining this action, which was admitted to be a novelty, was that all that was claimed by the plaintiff was compensation for the loss that had fallen on the personal estate, and, in form, the suit was for breach of contract, and the doctrine that there could be no recovery at common law in such a proceeding, by reason of the suffering and death of the person injured, was distinctly stated. Potter v. Metropolitan District Railway Co., 30 L. J. (N. S.) 765, is a case of the same complexion. And the old authorities are to the same effect, as will conspicuously appear by a reference to the summary of them appended, by way of a note, to the case of Wheatley v. Lane, 1 Saund. 216, the two decisions from the Law Reports being specially instanced by me, not on account of any novelty in the grounds of judgment, but for the reason that they exemplify with more than common distinctness, the limits to which an action on a contract will survive. For it will be observed that these two cases, both in form *ex contractu*, exclude from the recoverable damages all such as do not fall under the denomination of losses to the personal estate. This rule of decision accords with the principle adopted by this court in the case of Hayden v. Vreeland, 8 Vroom, 372, in which it was held that an action for a breach of a contract of marriage could not be maintained by or against the personal representative of either party to the contract.

Up to this point in my remarks on this subject, my object has been to show although at common law a certain class of actions *ex contractu* are possessed of the capacity to survive to the personal representative, that nevertheless this transmissible remedy is not a complete one; the importance of this circumstance will hereafter appear.

As has been already stated, the present action is in tort, in part for fraud, and in part for a breach of the duty of an attorney at law in not exercising due care and skill in the business of his client; and it can not, therefore, be doubted that, by the mere authority of the common law, the proceedings can not be vindicated. Consequently, the only debatable question arising in this connection is with respect to the proper construction of sections four and five of the act concerning executors. Rev. p. 396. These provisions are not strange to this court. They were considered and in one of their aspects construed in the case of Ten Eyck v. Runk, 2 Vroom 428. That was an action for damages caused to the plaintiff's land by water backed by the dam of the defendant, and the point decided was that such action was not abated by the death of the owner of the dam, but that it could be continued against his executor. It was admitted in that case, that such cause of action would have been extinguished at the common law, by force of the rule *actio personalis moritur cum persona*, and its persistence after the death of the defendant was attributed altogether to the effect of the enactment just referred to. That enactment is in these words, *viz.*: "Where any testator or intestate shall, in his or her lifetime, have taken or carried away, or converted to his or her use, the goods or chattels of any person or persons, or shall, in his or her lifetime, have committed any trespass to the

person or property, real or personal, of any person or persons, such person or persons, his or her executors or administrators, shall have and maintain the same action against the executors or administrators of such testator or intestate as he, she or they might have had or maintained against such testator or intestate."

In the case of Ten Eyck v. Runk, all that the court was called upon to decide was whether the term "trespass" in this clause signified those immediate wrongs that are remediable by the action of trespass *vi et armis*, or comprehended also those indirect injuries resulting from a tortious act, the appropriate means of redress for which is an action on the case, and the court put upon the expression this latter and more comprehensive interpretation. It is now urged in the argument of the counsel of the defendant, that while it may be that the case just referred to was correctly ruled, that the ground of judgment there adopted was too broad, and that, in the language of the brief, "the true construction of the act limits its application to injury to specific property, real or personal, and not to such a wrong as works no injury to any real or personal property of the plaintiff, but causes his estate generally to sustain a loss." But is this discrimination reasonable? If, in the instance of water thrown back on to the property of a person by a dam wrongfully erected on the land of another, the word "trespass" in this act means "tort" or "wrong," so as to embrace the consequential injury, why should it not have the same broad sense with respect to the indirect injury inflicted by a neglect? Is it a reason, or an assumption, to say that the statutory expression of trespass to property, real or personal, means damage done to some particular piece of property, and not an injury to the property in general? If it is correct to translate the word "trespass" in this clause by the word "wrong," it seems impossible to resist the conclusion that a wrong to personal property is done as manifestly, when one's personalty in the aggregate is injured, as when some particular item of it is damnified. The fact is, the discrimination, taken at its best, would be but a vague and shadowy one, for it seldom, if ever, happens that a loss falls upon a person's general estate, except by means of an injury to some particular part of it. Thus, if A should destroy by his carelessness bank notes, the property of B, to the amount of $1,000, under the rule suggested an action would survive; but if B lost these same bank notes through the deceit of A, an action would not survive. The idea that the legislature intended to give transmissibility to the former of these actions, and not to the latter, is absolutely not credible. This proposed test of the applicability of the statute, arising from the specialness of the wrong done, does not appear to be countenanced by the statutory language, and it certainly does not commend itself by its results. It requires the same word, standing in a clause of a statute, to have a two-fold meaning, being broadened in its application to one set of facts, and narrowed in view of another set, and occasions an action to survive in one class of cases, and to non-survive in another, where the loss suffered in each is, in substance, of the same character, and where the necessity for redress in the one is equal to that in the other. The exigency should be pressing indeed that should lead to the adoption of such a rule.

The fact is, the real question to be solved is whether these clauses of this act are to be construed strictly, or with the utmost latitude of interpretation, in view of its being a remedial act. In the case of Ten Eyck v. Runk the latter course was pursued, and it seems to me that method was strictly correct. This law was plainly intended to take the place, in an improved and amplified form, of the statute of Edward III., c. 7, *de bonis asportatis in vita testatoris*, and its purpose was to remove the same absurdities that had crept into the law by a technical adherence to the words rather than to the spirit of the old maxim, *actio personalis moritur cum persona*. This substitute, and its ante-type, are obviously *in pari materia*. The statute of Edward applied, according to its letter, only to goods carried away in the lifetime of the testator, but by a most liberal construction it was extended to remedy many other wrongs, some of which are referred to in the opinion in Ten Eyck v. Runk, and it would not be consistent with customary rules, I think, to refuse to exercise a like liberality in the interpretation of this substituted act. By ascribing to the term "trespass" the signification of tort, or wrong, and which is one of its meanings, the remedy is made approximately commensurate with the evil to be eradicated, and in this way actions for deceits and neglects will survive, as well as those in which the loss follows immediately from the tortious act. The language of the act is comprehensive enough for this purpose, and it is hardly permissible to impute a lesser design to the legislature, for there is a great incongruity in a plan that imparts the quality of survival to an action for a forcible injury, and which withholds the same quality from an action for a neglect or deceit. The one class of wrong is in general no more culpable than the other, and the injurious results in some cases, are identical in each. If a physician should intentionally inflict a wound on his patient, the action, it is clear, would by force of the statute survive; and surely if the same wound were occasioned by want of skill or carelessness, the same result should obtain.

And it is with this respect to the class of cases illustrated by the example just adduced, that the counsel of the defendant interposes another objection to the rule of construction above indicated. The point is strongly pressed, and it is this, that in that class of cases in which at common law a loss sustained may be considered at the option of the party injured, as the consequence either of a breach of duty or of a breach of contract, it could not have been the intention to bring such class within the operation of this act. The reason assigned for this contention is that the person injured can sue the personal representative of the person inflicting the loss, for the breach of the contract, and consequently there was no necessity

for legislative intervention. Thus, it is said, and said with truth, that upon general principles the culpable attorney or physician may be sued either for the breach of the implied contract, which obliges him to the exercise of skill and care, or in tort for a breach of duty with respect to the same particulars; and from this it is argued that as the former action will survive at common law, it is not to be supposed that it was the design uselessly to endow the latter with a similar vitality. But the cases presented in the commencement of these remarks deprive this contention of almost all of its cogency, for those cases show that the remedy that survives against the representatives of a deceased promise-breaker, in this class of cases, is one that is most incomplete, for no damages can be recovered in such suit, except such as have directly diminished the estate of the deceased. As an illustration, it appears in these cases if a personal injury is occasioned by the negligence of a carrier, that in a suit by the administrator of such person injured, in an action *ex contractu*, which is the only one the common law keeps alive after the injured person's death, the only damages recoverable are those that go to the impairment of the estate, and that there can be no compensation claimed for personal suffering. Such a redress is so imperfect that it can raise up no implication against a legislative design to keep alive the concurrent remedy for the tort, which is somewhat adequate, if not absolutely complete.

The above rule of construction which I have indicated should be adopted, receives countenance from the views of the English courts, expressed with reference to the correct exposition of the statute of 3 and 4 Wm. IV., c 42, § 2, an act which, with respect to the point now in question, bears considerable similarity to the clause of the statute now being considered. That act provides that an action may be "maintained against the executors or administrators of any person deceased for any wrong committed by him in his lifetime to another in respect to his property, real or personal. so as such injury shall have been committed within six calendar months before such person's death," etc. The important inquiry in the present connection is, what interpretation was put upon the expression "wrong" with respect to property, real or personal.

This provision was considered in its bearing upon the case of Morgan v. Ravey, 6 Hurl. & Nor. 265, which was an action in *assumpsit* against the executors of an inn-keeper, for breach of his implied contract to keep safely the goods of a guest. The question mooted was whether the law would imply a contract under the circumstances, but the court said: "It is not, however, necessary to determine this if the plaintiff elects to amend, which he may do. and we think successfully; because it seems to us, notwithstanding the ingenious argument of Mr. Phinn, that if the claim against the defendant is for a tort. it is for a 'wrong committed' within the meaning of the 3 and 4 Wm. IV., c. 42, § 2." The counsel of the defendant, in his brief, appears to consider this also a case of "direct injury to specific property," but I am not able to draw any sensible line of discrimination between the consequential loss of goods arising from a neglect, and the consequential loss of a sum of money by the same means. The decision seems to me to be much in point, and is entitled to much weight.

The same statute entered somewhat into the consideration of the case of Powell v. Rees, 7 Ad. & El. 426, and the general tendency of this decision is in the same direction with the rulings in the judgment just cited; and it has also this particular importance in our present inquiry, that it rules that this statute of William applies to that class of cases before referred to, in which, at common law the remedy is concurrent, by an action *ex contractu* or *ex delicto*.

But I think the observation and decision of the court in the case of Erskine v. Adeane, L. R. 8 Ch. App. 756, are more to our present purpose. There a claim was made by a land owner against the executors of a deceased tenant for life, for injury to his cattle by reason of the negligence of the deceased with respect to certain yew trees. in providing insufficient fences, and for throwing the cuttings on the plaintiff's land. The cattle in question were poisoned by eating of the yew trees and the cuttings thus exposed to them. Thus it appears the gravamen of the claim was for the consequential damages resulting from the negligence of the deceased. It was held that, while it was evident such an action would not have lain at common law, it could be brought, at any time within the period limited by the statute of William. This judgment rests upon the ground that the neglect in question, and which resulted in the loss of the cattle, was a wrong to personal property within the sense of those terms in the statute, and it is in consequence plain that this judgment is of much authority in our present investigation, unless a difference can be established with respect to principle, between a loss of particular cattle by a neglect, and the loss of particular moneys from the same cause. I cannot perceive such difference.

In Massachusetts a literal interpretation has been put upon the statute of that State upon this subject, a result which may in a degree be accounted for by the peculiar frame of the act, which is in the nature of an enumeration of the classes of cases in which actions shall survive, and which enumeration would, upon admitted principles, tend to contract the scope of the general terms used in the subsequent part of the section.

The judgment, I think, should be for the plaintiff in the present case.

NOTE.—See 1 Cent. L. J. 301; 2 Cent. L. J. 301; 4 Cent. L. J. 185; 9 Cent. L. J. 323.

The liability of a member of a mutual fire insurance company for assessments, and that of the company for losses cease on the surrender of the policy by the insured and its acceptance by the company, and a by-law providing for the continuance of the liability of the assured until the erasure of his name from the company's books, will not keep alive the liability of either party after an accepted surrender.—*Farmer's Mut. Ins. Co. v. Wenger.* Supreme Court of Pennsylvania.

NOTES OF RECENT DECISIONS.

LEGISLATIVE POWER CAN NOT BE DELEGATED.—Where the exercise of legislative power is constitutionally vested in a definite legislative body, it can not by that body be delegated to another. Therefore Congress, which is vested by the Federal Constitution with power to exercise exclusive jurisdiction over the District of Columbia, can not invest a local legislature with such power, and the act of February 21, 1871, which establishes a district government, so far as it attempted to confer on such government legislative power, was inoperative and void. Accordingly, a statute of the district legislature, established under said act, declaring certain judgments liens on real estate, was an act of legislation which Congress alone could pass, and was invalid.—*Roach v. Van Riswick*. Supreme Court of the District of Columbia. Opinion by COX, J. 20 Alb. L. J. 433.

NEGOTIABLE PAPER—PROTEST — DILIGENCE OF NOTARY — AGREEMENT TO DISCHARGE INDORSER.—1. Where a notary makes inquiry at the bank where paper it payable, and receives information from the cashier as to the residence of the indorser, upon faith of which the notary addresses the notice of protest, the jury are justified in finding that he has used due diligence. 2. An agreement between the holder of the note and a creditor of the maker, by which the holder was to accept fifty per cent. of his claim, to be secured by mortgage, which said assumption by the creditor so secured should be in full satisfaction of the holder's claim against the maker, does not discharge the indorser because the maker is a stranger to the agreement.—*Herbert v. Servin*. Supreme Court of New Jersey. Opinion by REED, J. Advance sheets of 12 Vroom.

CORPORATION—APPOINTMENT OF RECEIVER—EFFECT OF.—1. Placing the property of a corporation in charge of a receiver does not work its dissolution, nor is the title of the property changed; a power only is delegated to take charge of it and sell it. 2. The receiver of a corporation, appointed by the court of chancery, takes its property, including its franchises, in the same condition and subject to all the duties, obligations and liabilities that rested upon the corporation itself, and in the administration of his office is under obligation for the performance of every duty and obligation imposed upon the corporation by its charter, or by the general laws of the State.—*State v. Board of Railroad Commrs.* Supreme Court of New Jersey. Opinion by DEPUE, J. Advance sheets of 12 Vroom.

ELECTIONS—VOTES CAST IGNORANTLY WHEN NOT TO BE COUNTED.—At an election for city officers, held in P, the relator received twenty-six votes out of a poll of over eight hundred. The relator claims that there was a vacancy in the office of city judge, and that therefore he was duly elected, having received twenty-six of the twenty-nine votes cast for that office. There is a dispute as to whether the term of the incumbent, G, had expired. A number of voters, including the officers of election, testify that they did not know that such an officer was voted for until the polls had closed and the votes were counted. *Held*, that votes cast in such a manner can confer no title to the office, and can not entitle the relator to the interposition of this court in his attempt to obtain possession of it, or to displace the incumbent.—*State v. Good*. Supreme Court of New Jersey. Opinion by VAN SYCKEL, J. Advance sheets of 12 Vroom.

ASSAULT—ASSAULT AND BATTERY—TERMS CONSTRUED—CHARGE OF COURT.—Trespass for assault and battery. Plea, *son assault demesne*. Defendant having testified that after some words plaintiff began throwing mortar at him, admitted that he seized plaintiff and held him, and that afterwards, when they had become separated, and plaintiff was throwing mortar at him, he threw a piece of board at him, hitting him on the leg. The court, in charging on the burden of proof, said that defendant admitted that he assaulted plaintiff. *Held*, that the acts admitted constituted an assault and battery, and that as every battery included an assault, the charge was in that respect without error. "Those acts, thus admitted, were an 'assault' and battery. Every battery includes an assault, is a maxim—though every assault does not include a battery. The court was literally and technically correct in saying in the charge that defendant admits that he assaulted the plaintiff. The rest of the extract from the charge is not criticised, as it could not well be. The court committed no error in the matter excepted to. It may be proper to add that to the ordinary mind, the technical distinction between a simple assault, and an assault by a battery, is not very obvious or well understood, and when in common or professional parlance it is said that one person has assaulted another, the idea conveyed is that the one person has inflicted some actual violence upon the person of another—not having merely made a fear-inspiring demonstration of violence, without in fact inflicting it. However this may be in the general, in this particular case, the use of the word 'assault,' if understood in its restricted technical sense by the jury, would indicate a less injurious and damaging act on the part of the defendant, than if the term 'battery' or 'beating' had been used."—*Fitzgerald v. Fitzgerald*. Supreme Court of Vermont. Opinion by BARRETT, J. Advance sheets of 53 Vt.

NEGOTIABLE PAPER—NOTICE OF DISHONOR.—Notice of dishonor of a promissory note, however directed and posted, is seasonable to charge an indorser, if sent so as to be received by the same mail by which it would have been received if properly directed and posted. Thus, where the notice was posted on the day of maturity, addressed to E, where the indorser had formerly resided, and thence forwarded on the following day by the mail of the same hour to C, where the indorser then resided and where he received it, it was *held* that the notice was seasonable.—*First Nat. Bk. v. Wood*. Supreme Court of Vermont. Opinion by ROSS, J. Advance sheets of 53 Vt.

REAL AND PERSONAL PROPERTY—WHAT ARE FIXTURES.—1. Cotton machinery, such as Danforth spinning frames, twisting frames, etc., though fastened to the floor by nails or screws, or held in position by cleats: *Held*, to be personal property, and to pass under a chattel mortgage thereof, as against a mortgage of the realty subsequently given, describing the property as "all those certain mills, factories, etc., and all the machinery and fixtures in the same." 2. Personal property included in the chattel mortgage, but incorperated with the realty: *Held*, not to pass by the chattel mortgage as against the subsequent mortgage of the realty. The property was a steam-engine, securely and permanently bolted to a foundation set in the ground, with the boilers as a necessary adjunct thereto, together with the shafting, belting, couplings and pulleys to communicate the power; also, water-wheels and a water-wheel governor. A gas-generator, situated in a pit in a building constructed for it on the premises, the gas-pump connected with it, and the pipes, were also included. Also, gas-burners, as not being furniture but mere accessories to the mill. Also, steam-heating pipes laid on

hooks attached to boards fastened to the walls, and heating-pipes, part of the system of piping, which merely rested upon the floor, without being attached to it. 3. The fact that property personal in its nature, but not incorporated with the realty, has, in transmission, been passed merely by the deed for the land, does not establish its character. Its character is not affected by long-continued localization alone.—*Keeler v. Keeler.* Chancery Court of New Jersey. Opinion by RUNYON, C. Advance sheets of 4 Stew.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF KANSAS.

July Term, 1879.

[Filed Oct. 14, 1879.]

ILLEGAL CONTRACT — ATTORNEY— LOBBYIST. — 1. The contract of an attorney for services as such, whether the services are to be rendered before a court, a department of the government or a legislative body, is valid. 2. The contract of a lobbyist, in the sense in which that term is now used, for his services as such, is against public policy and void. 3. Where the services contracted for and rendered are partially those of an attorney and partially those of a lobbyist, and are blended together as part and parcel of a single employment, the entire contract is vitiated, and after performance no recovery can be had for the work done as an attorney. 4. There is no presumption that a contract is illegal. He who denies his liability under a contract which he admits having entered into, must make the fact of its illegality apparent. Reversed. Opinion by BREWER, J. All the justices concurring.—*McBratney v. Chandler.*

GUARDIAN'S DEED—EVIDENCE — HOMESTEAD — RENTS AND PROFITS.—1. There is no statute making a guardian's deed presumptive evidence that the directions and requisitions of the law have been observed and complied with in its execution, and, therefore, the proceedings and power by virtue of which it has been executed, must be shown before the deed can be introduced as evidence of a conveyance of the land therein described. 2. If the homestead, occupied by the widow and family of an intestate after his death, or any interest therein, is sold and conveyed, while the premises are still occupied as a homestead by the widow and any one or more of the minor children, the title to such property or interest passes to the purchaser, but such conveyance will not interfere with the occupation of the premises as a homestead by any of said occupants, not joining in the sale. 3. Where a plaintiff, in an action in the nature of ejectment, alleges in his petition that he has a legal estate in the real property therein described, and is entitled to the possession of all the property, and the proof shows he is a tenant in common of the property, and the defendant is a co-tenant, and that the defendant denies the plaintiff's right, the plaintiff may recover against his co-tenant any part or portion of the land to which the proof shows him entitled. 4. The rents and profits to be recovered in an action in the nature of ejectment are only those that have accrued within three years before the commencement of the action. Reversed. Opinion by HORTON, C. J. All the justices concurring.—*O'Gatton v. Tolley.*

[Filed Nov. 15, 1879.]

BUILDING ASSOCIATIONS.—Chapter 5, of the Laws of 1869 (Comp. Laws of 1879, p. 237, section 134), relating to loans by building, saving and trust associations, is valid, and has not been repealed, and applies in all cases where the loan was made in accordance with its provision and prior to March 20, 1875, the time when ch. 65, of the Laws of 1875 (Comp. Laws of 1879, p. 237, sec. 137), took effect. Reversed. Opinion by VALENTINE, J. All the justices concurring.—*Salina B. & L. Assn. v. Nelson.*

PUBLIC LANDS— POSSESSION — MORTGAGE.—1. S and L were settlers upon one hundred and sixty acres of the public lands, subject to pre-emption. Prior to its entry at the U. S. Land Office, L agreed verbally with S that if the latter would enter, prove up and pay for the same, he would not interfere, if S would deed to him sixty acres upon which the improvements were situate, after he had procured title from the United States. In accordance with this arrangement S proved up and paid for the land on January 9th, 1877. On the same day he executed a mortgage to P on the premises, to secure the payment of the money he obtained of him to pay for the land. This mortgage was duly filed for record on January 10th, 1877. On March 14th, 1877, S deeded to L sixty acres, in pursuance of the agreement between S and L, before the entry of the land. In an action by the owner of the mortgage to foreclose the same, the trial court held that the deed of S to L took precedence of the mortgage, and that the mortgage was void as a lien upon the sixty acres, as P and this assignee were charged with notice of the equities of L in the land by the fact of L's possession and occupation at the execution of such mortgage. *Held*, error, as the possession of L was neither exclusive, open nor notorious. Under his agreement with S the latter had the consent of L to represent himself the occupant and the possessor of all the land and improvements, and L's possession became to the public subordinate to the will of S. Reversed. Opinion by HORTON, C. J. All the justices concurring.—*Frezise v. Lacey.*.

SUPREME COURT OF MINNESOTA.

October-November, 1879.

MORTGAGE—RIGHT OF INFANT TO DISAFFIRM.—The mortgage of an infant upon his personal property for borrowed money, there being no delivery of the mortgaged property, is voidable at his election at any time during his infancy; and if the property is taken from his possession under the mortgage without his consent, he may reclaim the same upon disaffirmance of the contract without returning, or offering to return, the money borrowed, it not appearing that he has the ability so to do. Manning v. Johnson, 26 Ala. 452; Walsh v. Young. 110 Mass. 399; Chandler v. Simmons, 97 Mass. 508. Opinion by CORNELL, J. —*Miller v. Smith.*

CHARTER AMENDMENT — ACCEPTANCE OF—JUDICIAL NOTICE.—When the charter, or the amendment of a charter, of a municipal corporation, provides that it shall be submitted to a vote of the electors, and go into effect if there be a majority in its favor, a subsequent act of the legislature recognizing the charter or amendment as in force proves *prima facie* the acceptance of the charter or amendment. Courts take judicial notic of acts of the legislature creating municipal corporations. Judgment reversed. Opinion by GILFILLAN, C. J.—*State v. Lee.*

EVIDENCE—PROOF, WHEN DISPENSED WITH.—Where an act to be an offense must have been done within a particular place, although there be no actual proof of the place where the act was done, if it be apparent from the whole case that in the trial it was taken for granted that the act, if done at all, was done within the place, and there was no objection on the trial to the absence of formal proof of it, the judgment will not be reversed merely because there was no such formal proof. Judgment affirmed. Opinion by GILFILLAN, C. J.—*State v. Lee.*

PROBATE OF WILL —VALIDITY OF DEVISE.—The probate of a will does not establish the validity of any devise in it, even though there be but a single disposition of property made by the will. The decree of the probate court assigning to a devisee the property devised, establishes the validity of the devise conclusively as against all interested in the estate, unless an appeal is taken. Such a decree establishes the right to the property assigned of the person to whom it is assigned, the same as would the decree of any other court of competent jurisdiction, and if assigned to a devisee in trust it establishes the validity of the trust. Opinion by GILFILLAN. C. J.—*Greenwood v. Murray.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

October, 1879.

MONEY HAD AND RECEIVED — AGENCY.— Where the defendant was employed to purchase on behalf of four heirs of a person deceased, he being one of the four, the life interest of the widow of said deceased, in certain shares of a corporation, the understanding being that the other heirs were to contribute their proportion, and after such purchase the plaintiffs, the other heirs, each made formal tender to the defendant of their respective shares of the purchase money and demanded each one-fourth of the dividends received by the defendant upon said shares, and upon a refusal to pay the same brought actions for money had and received, it was *held*, that such action would lie. Story on Agency, § 212, and cases cited; Brigham v. Eveleth, 9 Mass. 538; Stiles v. Campbell, 11 Mass. 321; Hall v. Marston, 17 Mass. 575; Brinley v. Kupples, 6 Pick. 179; Fanning v. Chadwick, 3 Pick. 420; Hills v. Bearse, 9 Allen. 403. Opinion by AMES, J. —*Colt v. Clapp.*

TORT—NEGLIGENCE—DAMAGES. — Where the defendant was lawfully engaged in the work of blasting rock upon and within the limits of a railroad, and while said blasting was going on stones or pieces of rock were frequently thrown upon the plaintiff's premises lying adjacent to said railroad, and said premises were injured by the stones so thrown, and after said injury the defendant fully paid and satisfied them for all damage to their real estate, and the plaintiffs demanded of the defendant payment for damages occasioned by the interruption of their business, and the loss of time of workmen in their employ, which claim the defendant refused to pay: in an action brought to recover such damage, it appearing that the damage to the buildings was paid with the understanding that the plaintiffs waived no rights to recover for such interruption to their business, and that the workmen employed by the plaintiffs in and about said premises being reasonably apprehensive of danger from flying stones, voluntarily vacated said premises at the time of each blast, notice of which was giving by the blowing of a horn by some one in the defendant's employ, it was *held*, that the adjustment of the damages to the real estate was no bar to this action; that the damage to the plaintiffs' business, which the jury have found to be the result of a want of due care, was an injury distinct and separate in its nature from the damage to the building and not a mere aggravation of that damage; and that the measure of damages would be the value to the plaintiffs of the work which the defendant's negligence prevented from being done. Opinion by AMES, J.—*Hunter v. Farren.*

PROMISSORY NOTE— MORTGAGE — PAYMENT.—In an action upon a promissory note, to which payment was pleaded, it was agreed that a paper purporting to be a mortgage of certain real estate then owned by the defendants, was delivered to the plaintiffs to secure the payment of said note; that on the 2d day of October, 1876, the plaintiff, acting under the power of sale in said supposed mortgage, offered the premises therein described at public auction, default having been made in the payment of said note and interest, and said premises were declared sold to M, the highest bidder, who made the required deposit, and a proper memorandum was made to hold him to the purchase, had there been no defect in the mortgage. Said M, upon a tender of a deed of said premises and a demand of payment thereon, refused to accept said deed and pay the amount bid for the premises, for the alleged reason that the plaintiff had not any authority under said supposed mortgage and power of sale to sell said real estate, and could not by its deed give any title thereto, and upon demand the amount deposited by him was refunded to him. That thereafter, on the 5th day of February, 1877, by the direction of a committee of the defendant's society, a bill in equity to reform said mortgage by affixing a seal thereto was brought, in which the present plaintiff was made plaintiff, and the present defendant and M and other parties who had become interested in said estate were made defendants, and a decree was rendered in said suit, in accordance with the terms of which the seal of the defendant's society was affixed to said mortgage, and the same was signed and acknowledged by the defendant to be its free act and deed. *Held*, that under Gen. Stats., ch. 89, § 1, an instrument not under seal could have no effect as a conveyance of real estate: that the plaintiff bank therefore, at the time of the attempted sale had no title to the real estate and could convey none; that the sale was a nullity, and M under no objection to accept the instrument tendered to him as a conveyance to pay the amount of his bid; that the reformation of the mortgage, seven months after the attempted sale, would not have the effect to give validity to a transaction originally void, and thereby make the sale binding upon the purchaser, and that the note not having been paid by the property intended to be pledged for its security, was still in force. See Elwell v. Shaw, 16 Mass. 42; Warring v. Williams, 8 Pick. 326; Stewart v. Clark, 13 Met. 79. Opinion by AMES, J.— *Springfield Five Cents Saving Bank v. South Congregational Society.*

SUPREME COURT OF ILLINOIS.

[Filed at Springfield, October 2, 1879.]

NEGLIGENCE—COLLISION OF TRAINS—EMPLOYER —COMMON EMPLOYMENT — DANGERS INCIDENT TO SERVICE.—This action was brought by C against the C. B. & Q. R. Co., to recover for personal injuries sustained by plaintiff while in the service of defendant as an engine driver, on account of a collision of trains on defendant's road. Plaintiff recovered in the circuit

court, but on appeal to the appellate court that judgment was reversed. The facts are as follows: Plaintiff was a locomotive engineer in the service of the defendant running a passenger train between Camp Point and Quincy, where the collision occurred with a wild freight train belonging to the Toledo, Wabash & Western R. Co. The road between Camp Point and Quincy is used by both roads, but the time table of the C. B. & Q. R. Co. governs the running of all trains thereon. Under that time table, and the rules governing same, it was the duty of the freight train to have waited at Quincy for the passenger, the latter having the right of way, and it was through the negligence of the conductor of the freight train that the accident occurred. The plaintiff had been employed for a great many years, off and on, as engineer on the road and knew of the rules by which the road between Camp Point and Quincy was run. SCOTT, J., says: "Two propositions of law arise on the facts in this record: 1st. Was plaintiff engaged in a common employment with Gage the conductor of the 'wild train' whose negligence or wilfulness was the proximate cause of the injury to the plaintiff? and 2d, Was plaintiff injured by one of the ordinary perils of the service in which he was engaged? As an affirmative answer to the second question will be conclusive of the case, no discussion need be had on the first question. Plaintiff was quite familiar with the service and with the dangers to which he would be exposed. It was as well known to him as to defendant that trains of both companies would be run over this portion of defendant's road by employees of the different companies selected and paid by them respectively. One of the hazards incident to the service in which plaintiff was engaged was the fact that the employees of the respective companies might be negligent in the observance of the rules adopted to govern the running of trains. Plaintiff was under as much obligation to anticipate the employees of the Wabash company might become negligent in the observance of their duties as was defendant. The law is that an employee, when he enters upon any service, assumes all the ordinary hazards arising from the performance of the duties of his voluntary engagement. The running of trains is known to be a dangerous occupation, and that in which plaintiff was engaged was no doubt rendered more so by reason of the fact that trains were run over the same track by two distinct companies. But it can not with any show of reason be claimed that plaintiff was injured by anything that defendant did to render the service more dangerous than it was known to him to be before he engaged in it. Opportunity was afforded him to ascertain and become familiar with the work to be performed and the peculiar dangers to which he would be exposed, and knowing them as well as he did, the law is well settled that he assumed all the ordinary risks incident to his engagement. There is no warrant in law, or in any considerations that concern the public welfare, for the proposition that defendant impliedly contracted with plaintiff that the employees of the lessee company would observe strictly the rules adopted to secure safety in the running of trains over the road in which both companies were engaged. Experience teaches that in no service do the employees always observe due care. It is a matter of no consequence whether plaintiff was in a common employment with the servant of the lessee company whose negligence or wilfulness caused the injury. Plaintiff was not injured by any cause outside of the ordinary perils of the service in which he was engaged. See 77 Ill. 365; 61 Ill. 131." Affirmed.—*Clark v. Chicago, etc. R. Co.*

FIRE INSURANCE — CONTRACT—CONDITIONS IN POLICY—PROOF OF LOSS—CONSTRUCTION OF PROVISION VITIATING POLICY IF HOUSE VACANT AND UNOCCUPIED.—This is an appeal from a judgment rendered in the McLean county circuit court in favor of appellee and against appellant upon a policy of insurance against loss or damage by fire, issued by the latter upon the dwelling-house of appellee. Two reasons are urged for a reversal of this judgment. It is claimed in the first place that the proofs of loss were not made in accordance with the provisions of the policy. It is also objected that in violation of a condition in the policy, the house, at the time of its destruction by fire, was vacant and unoccupied. MULKEY, J., says: "The evidence bearing on the first point shows that shortly after the destruction of the house by fire plaintiff made out proofs of the loss and forwarded them to the company. The company returned them to plaintiff with specific objections. Plaintiff thereupon amended the proofs in the particular suggested by the company and sent them back. The latter never made any further objection to the proofs, but refused to pay the insurance money. Under the circumstances we regard it as immaterial whether the proofs as finally made out were sufficient or not. For whatever defects or irregularities may have occurred in making them out or amending them must be deemed to have been waived by appellant. The law is well settled that where proofs of loss are made out and delivered to an insurance company, within the time prescribed by the policy, it is its duty to point out specifically any objections it may have to the proofs as made out. Good faith and fair dealing requires this to be done, and if it is not done the company can not afterwards be heard to make such objections. It is in law estopped from doing so. And on the same principle, if upon making out proofs of loss, the company make certain specified objections, it thereby waives all other objections not specifically pointed out, and when they are amended with a view of obviating these specified objections, it is the duty of the company, on being furnished with the amended proofs, if the amendment does not make them acceptable to renew its objections, and if it does not do so at the time and the assured is lulled into security until the time limited by the policy for making out proofs has expired, it will be estopped from doing so afterwards. See 26 Ill. 365; 58 Ill. 75; 60 Ill. 465; 75 Ill. 14. Again, it is objected that in violation of, a condition in the policy, the house at the time of its destruction by fire was vacant and unoccupied. If this be true as a fact, it is fatal to appellee's right of recovery, and the judgment of the court below must for that reason, if no other, be reversed. It appears from the evidence that on the night of November 15, the same being Sunday, the dwelling-house covered by the policy was destroyed by fire. Some time before the loss appellee had determined to leave the premises and move to Nevada, and for several days before the fire he was actively engaged in making preparations to do so. He had already rented the premises to another, who was to have taken possession on Saturday, but in consequence of rain he was unable to do so. On the evening of Friday appellee's family left the premises without any intention of returning. Appellee remained on the premises Friday and Friday night, having retained with him a bed and bedding and some other articles of household goods of comparatively little value. He remained on the premises all of Saturday, but was not there Saturday night. He returned Sunday and remained until seven o'clock in the evening, and then went away, leaving his bed, bedding, etc., shortly after which the fire took place. And the question now presented is, can this court, upon this state of facts, say, as a matter of law, that within the meaning of the policy, the premises in question were

vacant and unoccupied at the time of the fire? A similar question arose in American Ins. Co. v. Padfield. 78 Ill. 167, and it was there said: 'A fair and reasonable construction of the language of vacant and unoccupied is that it should be without an occupant, without any person living in it. * * * The language is not used in a technical but popular sense.' This then must be taken to be the meaning of the term, and it results that the real inquiry in this case is, whether appellee might, at the time of the fire, be regarded, within the meaning of the policy, still living in the house in question, for it is manifest that his person was not in the house at the time. It must be conceded also that the mere fact that appellee had at the time of the fire a bed, bedding and other articles in the house would not of itself have protected him from the operation of the provision in question. And it is moreover equally certain that when the assured leaves the premises actually vacant—that is, without any occupant in them for an unreasonable length of time—the *animus revertendi* will not, however clearly it may appear, relieve him from the operation of such a condition in the policy. The object of courts when enforcing a provision in a policy like this should be to endeavor to so construct it as to give effect to what might reasonably be supposed to have been the intention of the parties when they consented to it. It will hardly be contended that such a condition requires that the assured or some of his family should be actually in the house all the time. If one, having a policy of this kind, may go to church or spend a day or night with neighbors without ceasing to be an occupant of the premises within the meaning of the policy, it follows that appellee's going to town on Saturday or Sunday night would not of itself have had the effect of relieving appellant from the obligation imposed by the policy. We are therefore of the opinion that the premises were not, within the meaning of the policy, vacant and unoccupied.' It is believed that no case can be found where premises have been held to be vacant and unoccupied under circumstances similar to those appearing in this case; and even if such case could be found, we would not feel inclined to follow it. Such a provision in a policy must have a reasonable, practical construction and not be made a mere snare to catch the unwary.'' Affirmed. WALKER and SCHOLFIELD, J.J., dissenting, say: 'We do not agree either in the reasoning or conclusion of this opinion. Unless the contract of the parties is affected by fraud or mistake it should be enforced as written, and where it is thus affected the remedy is in equity.''—*Phœnix Ins. Co. v. Tucker.*

SUPREME COURT OF IOWA.

October Term, (Dubuque), 1879.

CRIMINAL LAW—EVIDENCE OF GOOD CHARACTER.—The good character of a defendant in a criminal prosecution is always entitled to consideration, and should always have some effect upon the verdict. Where the evidence is circumstantial, and the several facts from which it is sought to draw the inference of guilt are clearly established, a jury may, from proof of good character alone, refuse to infer that the defendant is guilty. State v. Northrup, 48 Iowa, 583. Opinion by DAY, J. *State v. Jones.*

CITIES—POWER TO OFFER REWARD FOR CRIMINALS.—In the absence of express statutory authority a city as no power to offer a reward for the apprehen criminals, such power not being included in the general authority given to the city council to pass ordinances for the preservation of peace and good order in the city. Following Hawk v. Marion County, 48 Iowa 472, 7 Cent. L. J. 204. Opinion by ROTHROCK, J.—*Hanger v. City of Des Moines.*

USE OF WORD ''ONUS'' IN INSTRUCTION—WILL—WITNESSES TO SIGNATURE.—1. The use of the word *onus* in an instruction to the jury is not error; although a Latin word it has been incorporated into our language. 2. It is not necessary that the subscribing witnesses to a will should see the testator sign the instrument; it is sufficient if he acknowledges its execution in their presence; the formal act of affixing his signature may be proved by testimony other than that of the subscribing witnesses. Opinion by BECK, C. J.—*In re Conroy.*

CRIMINAL LAW—ADULTERY—MARRIAGE AFTER VOID DECREE OF DIVORCE.—The defendant, in 1872, procured a decree of divorce from his wife, Roana Whitcomb, and, in 1873, was married to another woman. Afterward, at the suit of the said Roana, the decree divorcing her from defendant was set aside on the ground of fraud practised by defendant in procuring it, and for want of jurisdiction of the court by which it was granted. Defendant was indicted for the crime of adultery in unlawfully cohabiting with the second wife, was convicted and appealed. *Held,* that the decree of divorce having been adjudged void, was so from the beginning, and afforded no protection to defendant even for acts done before it was set aside; also that evidence of the good faith with which defendant contracted the second marriage was properly excluded. Citing State v. Goodenow, 65 Me. 30; Com. v. Ewell, 2 Met. 190; Com. v. Marsh, 7 Met. 472. Opinion by BECK, C. J.—*State v. Whitcomb.*

PUBLIC LANDS—ENTRY—MISDESCRIPTION IN APPLICATION.—In 1854 E. applied to enter land under a land warrant, intending to enter a tract in range sixteen, but by mistake the application described the land as in range six; the minute upon the warrant, the entries in the tract and plat books of the land office, and the duplicate certificate issued to E. however, contained the correct description. The corresponding numbers in range six were not at that time subject to entry. In 1866 the land in range sixteen was restored to market by the land department, and was entered by W. to whom a patent was issued in 1867. This patent was afterward cancelled and one issued to the land upon the prior entry of E. In an action by W. to recover the land: *Held,* that the mistake in the application of E. was not sufficient to vitiate his entry, and that his patent although subsequent in date to that of W. related back to the date of his entry, and conveyed the title of the government at that time. Opinion by ROTHROCK, J. *Weeks v. Loy.*

SUPREME COURT OF INDIANA.

November, 1879.

PROMISSORY NOTE—SURETY—EXTENSION OF TIME—Action against appellant and McBride upon a joint promissory note signed by them. Appellant answered that he was surety on the note, and that an extension of time had been given to McBride without his knowledge or consent. *Held,* that as the appellant and McBride were apparently joint makers of the note, appellant's answer was not sufficient, because it failed to allege that at the time the extension was given the plaintiff had notice that appellant was surety. 63 Ind. 64; 2 Met. (Ky.) 247; Brandt on Surety-

ship, sec. 17. If a demurrer to the answer had been filed it should have been sustained, but when issue is joined on a bad answer, and upon the trial its allegations are proved to be true, it does not follow that the finding should be for defendant; such immaterial issue should be disregarded. Affirmed.—*McClosky v. Indianapolis Manufacturing Union.*

PROMISSORY NOTE—CONDITION—FAILURE TO FULFILL.—Action upon a promissory note given by appellee to the Junction Railroad Company, and by it assigned to appellant. The note was given for capital stock of the company, and contained the following stipulation: "If said road is not completed by the 25th of December, 1866, and the cars running to Rushville, then this note is null and void." *Held*, that to render the note a valid and binding contract it was necessary that the railroad company should have its road completed to Rushville, and that the cars should be running to that point by December 25, 1866. It was not necessary that the road should be perfect and finished in every particular, but that the road should have been so far completed on its established line as to have the cars running to Rushville on the day specified and, with reasonable regularity thereafter. The evidence tended to show that the cars which run to Rushville on the 25th of December, 1866, were not run over the located line of the road, but over a temporary track laid down for the purpose, and that it was fully four months after that day before the cars were running to Rushville on said road. The note was null and void. Affirmed.—*Freeman v. Matlock.*

LOTTERY—VESTED RIGHTS—TERRITORIAL LEGISLATION.—The appellant was charged with the unlawful sale of a ticket in a certain gift interprise for the benefit of the Vincennes University. In 1807 an act was passed by the "legislative council and house of representatives" of the Indiana Territory, incoporating said university, and providing that "for the support of said institution and for the purpose of procuring a library, etc., there shall be raised a sum not exceeding $20,000, by lottery." On May 1, 1879, the trustees of the university, pursuant to said act, set on foot a lottery for the purpose of supplying the institution with funds, and the appellant was appointed agent to sell the tickets. On trial he was convicted. *Held*, that at the time of the passage of the act the ordinance of Congress of 1787 was the fundamental law for the government of the territory, and under that law the territorial legislature had the power to incorporate the university and endow it with the power of raising a fund of a specific amount by a lottery scheme. The institution was a private corporation, and when its trustees accepted the terms of the act of incorporation, the franchises and privileges with which the university was endowed became matters of contract and vested rights, which could not be abridged or impaired by any subsequent government thereafter organized within said territory. Section 8, of the present Constitution, adopted in 1851, provides that "no lottery shall be authorized, nor the sale of lottery tickets allowed." This has reference only to the future. Neither the Constitution of 1851, nor any law enacted thereunder, could impair the lottery franchise with which the Vincennes University was endowed by the territorial law incorporating it. 14 How. 268; 4 Wheat. 578; 19 Ind. 407. The appellant was, therefore, not guilty of a violation of the misdemeanor act. Reversed. *Kellum v. State.*

RAILROADS—POLICE REGULATIONS— NUISANCE—CONSTITUTIONAL LAW.—Appellant was enjoined from sounding the whistles of its engines in compliance with the act of 1879, on the ground that so much whistling constituted a nuisance. The statute requires engineers to sound their whistles when such engine is not less than eighty nor more than one hundred rods from such crossing, continuously from the time of sounding such whistle until such engine shall have fully passed such crossing: *Held*, if the statute is valid there was no ground for the injunction. Viewed merely as an infringement upon the chartered rights of railroad companies, the statute is clearly valid. It is a police regulation, clearly within the scope of legislative authority, and of the importance or necessity of which the legislature must be the judge. To the statement that the constant whistling required by the act is a nuisance, it may be answered that the legislature may, when deemed necessary for the public good, permit or require that to be done which would on common law principles and without the statute, be deemed a nuisance. That which would otherwise be a nuisance, if done under the authority of law for the public good, is justifiable. 2 Red. on Rail. 408. The necessity and propriety of the enactment in question was exclusively for the legislature, and not for the courts to pass upon. If the law is unconstitutional the courts should hold it void, but upon no other ground can it be disregarded. The law is not unconstitutional, and the judgment below must be reversed. *Pittsburg, etc., R. Co. v. Brown.*

SUPREME COURT OF WISCONSIN.

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APPEAL FROM JUSTICE COURT—SUFFICIENCY OF AFFIDAVIT.—1. The circuit court can not take jurisdiction of an appeal from a justice's court without the statutory affidavit, made by the appellant or his agent, R. S. sec. 3754; and a substantial defect in the affidavit can not, therefore, be waived or amended in that court. 2. The signature of the affiant is essential to an affidavit. Whether his name written by himself in the body of the affidavit is sufficient, *quære*. 3. A paper in the form of the statutory affidavit, purporting to be made by the appellant, was returned by the justice with his certificate that it was subscribed and sworn before him. It was not subscribed, and there is nothing in the record to show that the appellant's name in the body of it was in his own handwriting; but he appears to have signed the notice of appeal and the undertaking, on the same sheet with the affidavit. *Held*. that the affidavit was insufficient. Opinion by RYAN, C. J.—*Wright v. Fallon.*

CRIMINAL LAW—RAPE—INSTRUCTIONS.—1. In a prosecution for rape, it was not error, against the accused, to omit to instruct the jury, in the general charge, that if they did not find him guilty of rape, they might find him guilty of assault with intent to commit that crime. 2. The court below did not caution the jury that prejudice was liable to be aroused against the accused because of the heinous nature of the crime alleged; nor call their attention to the difficulty of defending against such an accusation; nor press upon their attention the rule that voluntary submission by the woman while she has power to resist, however reluctantly yielded, deprives the act of an essential element of rape; nor instruct them that proof of the good reputation of the accused as a peacable and law-abiding citizen (there being such proof in the case) was entitled to some weight in his favor, especially if there were circumstances proved on the trial upon which a doubt of his guilt might be based. The court also refused instructions asked by the accused, containing some inaccuracies, but which aimed to state the foregoing propositions. *Held*, in view of the evidence at the trial, that such neglect to charge was error. Opinion by LYON, J.— *Connors v. State.*

EVIDENCE — COMPARISON OF HANDWRITING —

CRIMINAL LAW—ADMISSIONS—PROOF OF OTHER CRIMES.—1. The rule in this State is that, for the purpose of determining whether a paper offered in evidence is in defendant's handwriting, the jury may compare it with other documents already admitted in evidence upon other grounds, and shown to be in his handwriting; but that such a paper can not be put in evidence for the mere purpose of such a comparison. 2. On trial of an indictment it appeared that public officers, while questioning defendant as to his participation in the crime charged, repeated orally to him the words of a letter supposed to have been written by him, containing threats of such crime; and that defendant, in their presence and at their request, wrote on another paper the same words. Said officers, while testifying at the trial to the admissions of defendant at such examination, produced such copy, and it was received in evidence and submitted to the jury for comparison with the original letter: *Held*, that it formed no part of defandant's admission, and not being admissible for any other purpose than that of such comparison, it should not have been received for that purpose under the foregoing rule. 3. Arson not being in general a crime of like nature and intent with forgery or larceny, in the trial of an indictment for arson, proof that defendant had been guilty of forgery and larceny is not admissible, unless accompanied by evidence that the latter crimes and the one charged had a common purpose, or that one was committed to conceal the others. Opinion by ORTON, J. *State v. Miller*.

BOOK NOTICES.

A DIGEST OF THE LAW OF EVIDENCE IN THE UNITED STATES, adapted from the English work of SIR JAMES FITZJAMES STEPHEN, K. C. S. I., with references to the decisions of the Federal and State Courts. By WILLIAM REYNOLDS, of the Baltimore Bar. Chicago: Callaghan & Co. 1879.

The reprinting of Stephens' Digest of Evidence continues; the profession is still deluged with this book, whose fountains are now opened at three different points in the country, at Boston, St. Louis and Chicago. Sir James Stephen's Digest has been deservedly popular in America, and has been purchased more freely by the profession here than any English work which has appeared for many years. No other law book ever was in so short a time reprinted so often. It first appeared in 1876, at which time we reviewed in this JOURNAL the English edition. See 3 Cent. L. J. 519. Next came a reprint by a St. Louis firm of the English text unaltered, in pocket form. A little later it was issued "with American notes" by a Boston house. In noticing that edition we made a few remarks which we desire to repeat here: "The first American reprint was published in pocket form. In that shape it was a novelty in book-making, and was much sought after by the busy lawyer, containing as it did the principles of the Law of Evidence in a nutshell. In this edition this popular feature is gone, and we are given instead a volume not a great deal smaller than the ordinary law book. We are decidedly of the opinion that the great merit of this digest is lost by its being subjected to the treatment which all English treatises on the law are subjected to in this country, that is to say, by its size being swelled by American notes. The present edition is both too large and too small. It is too large to be handy and too small to be useful. It must now stand on the shelf instead of being carried in the pocket, and at the same time it is a very incomplete digest of the Law of Evidence as announced by our courts. The American notes are scattering and unsatisfactory, and we can not help thinking that the opinion of the profession will be that a useful book has been spoiled by being too much edited."

These remarks are as applicable to the Chicago edition now before us as they were to the Boston edition, about which they were written. There may exist different opinions concerning the "padding" of a book of this kind by American notes, but we, at least, can see nothing to justify it. Mr. Reynolds' notes are no better—they seem, indeed, to be more meagre—than those of Mr. May, who edited the Boston edition. He has made some changes in the English text, but these are trifling. We know of no publication that there is less call for by the profession, and less need for, than this third reprint of Sir James Stephen's Digest.

STUDENTS GUIDE TO ELEMENTARY LAW, consisting of questions on Walker's American Law, and Blackstone's Commentaries, with References to Illinois Statutes and Decisions, where the law of the State differs from that laid down in the text. By REUBEN M. BENJAMIN, Professor of Law in the Illinois Wesleyan University. Chicago: The Chicago Legal News Company. 1879.

We heartily recommend this as a very valuable aid to law students. Its plan is simply to give a number of questions without answers upon the books stated in the title, leaving the student to answer them from his memory, or compelling him to refer to the text. The questions are exhaustive and thorough; they cover every point stated by the authors of the principal works. We can think of no more admirable manner of preparing for legal examination than this; first reading such comprehensive treatises as Blackstone's Commentaries and Walker's American Law, and then testing the thoroughness of the study by the questions contained in this little book. Such a preparation is so much ahead of a "cram" by means of a "compendium" or "abridgment of elementary law," or other constructive frauds of that ilk, that it is easy to see how the latter are only tolerated through the inexperience of those to whom they are offered, and their neglect to take proper advice before using them. Mr. Benjamin's guide should be in the hands of every student who is preparing for entrance into the legal profession, The form adopted by the publishers could not be improved; they have indeed made a beautiful pocket volume. It is hard to believe that the volume before us and a former attempt of a similar character, the "Report of the Examination of Law Students," (see 7 Cent. L. J. 79,) could have come from the same house.

NOTES.

Hon. George McCrary has been unanimously confirmed by the Senate as Circuit Judge of the United States for the Eighth Circuit.——On the 1st. ult. Chief Justice Waite announced the adoption of the following new rule (No. 31) of the Supreme Court of the United States: "All records and arguments printed for use of the court must be in such form and size that they can be conveniently cut and bound, so as to make ordinary octavo volumes. After the 1st day of October, 1880, the clerk will not receive or file records or arguments intended for distribution to the judges that do not conform to the requirements of this rule."——Judge Nelson of Minnesota has been holding the Federal Circuit Court at Des Moines for the last month.——Judge Moses Hallett, of the United States District Court of Colorado, was severely injured by a fall on Tuesday last. In endeavoring to avoid a runaway team he stepped into a building which was in course of construction and, falling through the floor, received internal injuries of a grave character.